

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,

Plaintiff,
v.
LAWSON SOFTWARE, INC.,

Defendant.

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: Civil Action
: No. 3:09CV620
:
: October 28, 2011
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COMPLETE TRANSCRIPT OF CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Scott L. Robertson, Esq.
Jennifer A. Albert, Esq.
Michael T. Strapp, Esq.
David M. Young, Esq.
GOODWIN PROCTOR
901 New York Avenue, NW
Washington, D.C. 20001

Craig T. Merritt, Esq.
CHRISTIAN & BARTON
909 E. Main Street, Suite 1200
Richmond, VA 23219-3095

Counsel for the plaintiff ePlus

DIANE J. DAFFRON, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 APPEARANCES: (Continuing)

2 Kirstin L. Stoll-DeBell, Esq.
3 William D. Schultz, Esq.

4 MERCHANT & GOULD
5 3200 IDS Center
6 80 South Eighth Street
7 Minneapolis, MN 55402-2215

8 Dabney J. Carr, IV, Esq.
9 TROUTMAN SANDERS
10 Troutman Sanders Building
11 1001 Haxall Point
12 P.O. Box 1122
13 Richmond, VA 23218-1122

14 Counsel for the defendant Lawson Software.

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1 (The proceedings in this matter commenced
2 via conference call at 4:30 p.m.)

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4 THE COURT: Hello. This is ePlus, Inc.
5 against Lawson, Inc., 3:09CV620.

6 Who's here for whom, beginning with counsel
7 for the plaintiff?

8 MR. WILLETT: Judge, on behalf of ePlus, you
9 have Henry Willett with Christian Barton in Richmond.
10 Additionally, you have Jennifer Albert, Scott
11 Robertson and Michael Strapp.

12 MR. CARR: Judge, this is Dabney Carr with
13 Troutman Sanders on behalf of Lawson Software. Also
14 on the line for Lawson Software are Kirstin
15 Stoll-DeBell of Merchant & Gould, and Dan Thomasch,
16 Jason Lo, and Josh Krevitt of the law firm of Gibson
17 Dunn.

18 THE COURT: I've been gone for three weeks.
19 When did Gibson Dunn get in this case?

20 MR. CARR: While you were gone, Judge, we
21 filed -- this is Dabney Carr again. We filed pro hac
22 vice motions for them, and they have, I believe, all
23 been granted.

24 THE COURT: Yeah, I think I remember signing
25 some motions.

1 All right. What I have here is a letter that
2 deals with a continuance motion basically and a
3 limitation on discovery. I've just gotten some letter
4 from Mr. Thomasch, I guess.

5 I'm having a lot of static from somebody or
6 is it me that's causing it? Is somebody on a strange
7 phone?

8 MR. CARR: Yes, Your Honor. This is Dabney
9 Carr again. As I told your clerk, Dan Thomasch was
10 traveling and had to call in from a cellphone. So I
11 think that's where the static is coming from.

12 THE COURT: Are you moving, Mr. Thomasch?

13 MR. THOMASCH: Yes, I am, Your Honor, but I'm
14 hands free and legal, but I'll hang up if that's a
15 problem because Mr. Krevitt or Mr. Lo could handle the
16 call.

17 THE COURT: No. The reason we're having the
18 trouble is because you're moving. Pull over to the
19 side of the road.

20 MR. THOMASCH: I will do that.

21 THE COURT: And my guess is it will go away,
22 but I may be wrong.

23 MR. KREVITT: Maybe, Dan, if you can mute it.

24 MR. THOMASCH: I've stopped, Your Honor.

25 THE COURT: Have you got the window down?

1 MR. THOMASCH: I'm stopped and the windows
2 are up.

3 THE COURT: All right. Now let's try it.
4 Talk to me, Mr. Thomasch. Recite the Gettysburg
5 address or something.

6 MR. THOMASCH: Four score and seven years
7 ago.

8 THE COURT: Yeah. Our fathers brought forth
9 on this continent a new nation. And you did very
10 well, and I think that solves the problem.

11 All right. I haven't had a chance to even
12 read this letter that you submitted, Mr. Thomasch.
13 But anyway, I think this. If there's a request for a
14 continuance, we need to sort that out. I don't have a
15 lot of time in December to try a case. And also I am
16 substantially distressed that somebody is producing a
17 million documents in a case where I doubt that many
18 were produced during the course of the original
19 litigation, but maybe there were. But, ostensibly,
20 this should involve only those things that happened
21 after a certain period in time, and I don't know why
22 we're doing a million cases.

23 And I don't think I've ever seen a privilege
24 log that contains 2800, 2900 pages, and it's just not
25 going to be allowed to happen. And if you stay with

1 that position, then I'm just going to overrule all
2 privilege as an abuse of the process and be done with
3 it.

4 You get back and you go through that 2900
5 pages and you cut it down to what is real. And don't
6 have a bunch of legal assistants go through there
7 because some lawyer's name appears on there, they
8 claim it's privileged or work product.

9 Now, you-all filed a revised privilege log
10 today; is that right?

11 MR. THOMASCH: We are filing one, Your Honor.
12 May I address very briefly those three points?

13 THE COURT: It's hard to understand you.

14 MR. KREVITT: Dan, let me jump in real
15 quickly.

16 Your Honor, this is Josh Krevitt.

17 And then, Dan, jump in as needed because
18 you're a bit closer to it, but given the phone, let me
19 take a shot at it.

20 Your Honor, we are very sensitive to - this,
21 as I said, is Josh Krevitt - to the complaint that
22 ePlus has made regarding the number of documents
23 produced, but I want to give the Court a little
24 context for that.

25 The allegations, as Your Honor knows, are

1 very serious here, that our client is in contempt of
2 an order of this court. We are here to prove to Your
3 Honor that that's not the case. We're confident that
4 ePlus won't be able to prove that that is the case.
5 But we want to make sure -- it's very, very important
6 that -- we heard the Court or we read the transcript
7 and understand this court very well, that we did not
8 want to interpose objections or withhold any documents
9 or create any ancillary issues that could possibly be
10 raised by ePlus that we're withholding any information
11 at all.

12 The document requests that were made were
13 extraordinarily broad. We tried to confer with ePlus
14 to narrow those requests so that we wouldn't produce a
15 million pages of documents. It's not only incredibly
16 burdensome for us, but very, very few of the million
17 pages of documents are going to be relevant to these
18 issues. We completely agree with the Court.

19 Those efforts to narrow the scope of the
20 requests, though, were unsuccessful. And because we,
21 again, maybe we're overly sensitive in this regard,
22 we're very sensitive to any suggestion that we are
23 withholding anything or otherwise preventing ePlus
24 from trying to prove its case, we went ahead and
25 gathered all responsive documents and produced them.

1 We agree, though, with the Court that a
2 million pages of documents is an awful lot of
3 documents. It's just the nature of what the requests
4 called for. It was all documents regarding these
5 products. Those are very, very broad requests. And
6 it's for that reason, Your Honor, that the privilege
7 log is so long as well because the broad scope of the
8 document requests pulled within them an enormous
9 amount of what we think will be clearly privileged
10 material. And we will go back and give those
11 documents a hard look immediately and try to cull out
12 what we can.

13 But I wanted to at least address what might
14 be a concern of the Court that Lawson is deliberately
15 producing a lot of material. We wanted to produce
16 much less and just weren't able to reach an agreement
17 regarding the scope of the production.

18 MR. ROBERTSON: Your Honor, this is
19 Mr. Robertson. May I briefly respond?

20 THE COURT: Yes.

21 MR. ROBERTSON: Your Honor, you may recall on
22 September 15 we had a conference call in which the
23 parties were contemplating a September 30 production.
24 Lawson asked for an extension to October 7. I agreed.

25 We then served 20 targeted requests that

1 were, I think, less than one-fifth what we had done in
2 the entire litigation, addressed to one software
3 application, this RQC.

4 Your Honor will probably recall that there
5 were multiple software applications and modules
6 involved in the trial. We were only looking for RQC.
7 We did it for a limited period of time from the jury
8 verdict going forward, and also limiting that.

9 On October 6, the day before the production
10 was due, we got a production from them saying, Here
11 are the search terms.

12 We actually tried to work with Lawson to say,
13 Let's narrow the search terms and give you something
14 that's more focused. And we did that the following
15 day.

16 Showing no good deed goes unpunished, they
17 then said, Well, you have now caused us to do this all
18 over again. We were willing to work with them on
19 these dates on this production, but the production is
20 not complete and won't be complete until sometime next
21 week when it's represented to us.

22 We have more than a million documents, which
23 exceeds the production in the entire litigation, for a
24 limited period of time. When we were asking for
25 documents in the litigation, it went back for six

1 years. That's inconceivable to me. But nonetheless,
2 I've hired ten outside contract attorneys to come in
3 to try to do a review as quickly as we possibly can at
4 significant expense, but even under our own estimates,
5 that won't be done now for another two weeks if the
6 production is completed next week. And we have no
7 assurances that that's going to be the case.

8 Even just last Friday, Lawson produced
9 750,000 pages of documents, and the same day clawed
10 back 10,000 documents based on an alleged
11 attorney-client privilege, which is just baffling to
12 me. One of the documents, we just looked at them, is
13 an audio file of the theme song from the movie
14 *Ghostbusters* as privileged. So I don't know what's
15 going on, Your Honor, but I'm trying to get a handle
16 on it so we can actually have a meaningful hearing.

17 So that's why we wanted to get in front of
18 you as quickly as we can. The fact that the
19 November 28 hearing is just not going to be practical
20 given that I have to finish this massive document
21 review and then be able to take meaningful
22 depositions. So that's the first thing on our agenda.
23 We just didn't want to sit on that with the Court --
24 understanding the Court has a busy schedule.

25 MR. KREVITT: Your Honor --

1 THE COURT: Wait a minute. Did you claim as
2 privileged the audio of *Ghostbusters*?

3 MR. LO: Your Honor, this is Jason Lo from
4 Gibson Dunn, if I may address that issue.

5 While Your Honor was out, as Your Honor
6 knows, we had two hearings before Magistrate Judge
7 Dohnal. At that hearing -- at the first hearing,
8 which occurred last Monday, Mr. Robertson expressed
9 the same concerns that he's expressing to the Court
10 now, which is that we're looking at a large amount of
11 documents, all of which, by the way, are simply the
12 documents that are responsive to the search terms that
13 ePlus provided. We are simply following exactly --

14 THE COURT: Mr. Lo, I asked a simple
15 question. And the answer to it is yes or it is no.
16 Did you claim as privileged the audio from
17 *Ghostbusters*, from the theme song? Did you or didn't
18 you?

19 MR. LO: No, Your Honor.

20 THE COURT: You did not?

21 MR. LO: No, Your Honor. And if I can
22 elaborate on that because it has to do with --

23 THE COURT: Mr. Robertson?

24 MR. ROBERTSON: I'll send you the Bates
25 numbers, Your Honor, and the file.

1 THE COURT: Have you got the document?

2 Mr. Robertson, do you have the document?

3 MR. ROBERTSON: Yes, we have the Bates range
4 and the file number, yes.

5 THE COURT: You send me the Bates range and
6 the file number. And you send me the document that
7 matches it, Mr. Lo. And if, in fact, you have claimed
8 that as privileged, that will be a relevant matter in
9 deciding how valid your claims are.

10 MR. THOMASCH: This is Mr. Thomasch. Can I
11 address that briefly because I was speaking at the
12 hearing where the procedure for the privilege was set
13 by the magistrate judge?

14 THE COURT: If you know the facts about
15 whether you claimed it as privileged or not, yes. Did
16 you?

17 MR. THOMASCH: The fact is, Your Honor, is
18 that we have not until today. Today we are making our
19 claim of privilege. What we did before with the
20 understanding of all parties and the blessing of the
21 magistrate judge was we simply identified any
22 documents that we had to review for privilege. And
23 the documents that we had to review for privilege
24 included documents in which the author or the
25 recipient was an attorney.

1 Those documents are being read. They are not
2 assumed to be privileged. We are not making such an
3 assumption. We are not having paralegals do that. We
4 are having lawyers do it. We are not having contract
5 lawyers do it. We're having our own staff members,
6 associates in our firm do it, and until they read the
7 document and make a determination it's privileged, we
8 are not claiming privilege.

9 So there was never an attempt to claim the
10 theme song as being privileged, but my understanding
11 is that many things were originally caught within the
12 system, and all that meant, Your Honor, is that we had
13 to review the document. That was the procedure that
14 the magistrate judge set for us.

15 Today is the day on which we are supposed to
16 have finished our review and actually turn over the
17 log. And next Wednesday we will produce many
18 documents that we reviewed for privilege and
19 determined were not privileged.

20 So no document has been claimed as privileged
21 yet, Your Honor, and we certainly have no intention of
22 claiming that document as privileged. We simply had
23 to review it before we could turn it over.

24 THE COURT: Mr. Thomasch, you need to slow
25 down, rev your engines back. Decisions get made

1 better if I can follow what you're saying, and you
2 don't get going so fast I can't even keep up with you.

3 MR. THOMASCH: Yes, Your Honor.

4 THE COURT: That all could have been said
5 with the following sentence: There was listed a
6 document that potentially was privileged, the audio
7 from *Ghostbusters*, because the filter through which we
8 were making the review had a name of a lawyer, and
9 under the procedure agreed, all we had to do
10 originally was list the documents that we potentially
11 were going to review. And so, therefore, while we
12 did, in fact, list that as a potential document, we
13 haven't claimed it yet. That would have been
14 sufficient. All right? That will be the way this
15 whole proceeding from now on will be conducted,
16 please.

17 All right. Now, Mr. Robertson, did you want
18 to say something?

19 MR. ROBERTSON: Just very briefly, Your
20 Honor. I think it would be productive if we dispense
21 with the finger pointing and get to how we're going to
22 try and get a hearing done.

23 I will just say the document that I mentioned
24 was clawed back from the production. So in order to
25 have it clawed back under the protective order, I

1 would have thought someone would have reviewed it in
2 order to make the clawback response. But let's leave
3 that aside and just -- I find myself in a difficult
4 position, Your Honor, given that I have to finish this
5 review and prepare for a hearing.

6 I will say that Mr. Thomasch and his team and
7 my team had a fairly protective discussion for about
8 an hour last evening where we were able to agree on
9 certain things and come to an agreement to disagree on
10 other things, including the scope and nature of the
11 hearing that Your Honor contemplates.

12 We want it to be efficient. We want it to be
13 quick. I'm concerned that Lawson wants to turn this
14 into a retrial of the case based on our discussions.
15 We are willing to identify witnesses. We're willing
16 to identify exhibits, but given the time the Court has
17 available, I can't envision this as a retrial, and I
18 don't think the Court envisioned this as a retrial.

19 There are three focused issues that Lawson
20 contends are different from RQC and RSS. And we think
21 the hearing ought to focus on that and whether they
22 are colorably different or not.

23 This is not a new infringement trial. And I
24 don't think the Court ever contemplated that and I
25 don't think the case law contemplates that. For

1 example, Lawson's indicated it wants to have another
2 round of prehearing briefing on these issues. We
3 think we have briefed it to a fare-thee-well. We're
4 ready to move forward, put on our evidence, be able to
5 supplement it with whatever evidence comes out during
6 this discovery period, and provide post hearing
7 contempt briefing on these issues.

8 That's been my experience. I've gone and
9 looked at the post *TiVo* hearings. I've never seen
10 anything like Lawson is contemplating on this. Even
11 the post *TiVo* hearings, and that's the seminal case
12 that came down back in April, Your Honor, shortly
13 after our injunction hearing that sets forth the
14 procedures for this.

15 No one has contemplated multi-day hearings on
16 these things. We'd like to get done and move forward,
17 but we'd like to have an opportunity to review the
18 documents and take the depositions in an orderly
19 fashion subject to the Court's docket, which I
20 understand is extremely busy.

21 THE COURT: Do you know how many depositions
22 you are planning to take at this point?

23 MR. ROBERTSON: I think we have a good
24 estimate. The parties have been talking about that.
25 We talked about that yesterday, Your Honor. We said

1 we'd work with each other's schedules.

2 We have a 30(b)(6) deposition out in which
3 they've identified about six or seven potential
4 witnesses. I asked Mr. Thomasch if he could perhaps
5 try and consolidate that, those number of witnesses,
6 and educate people. I told him I would work with him
7 to do them sort of seriatim on the topics. Let's just
8 move in and move out.

9 I think Your Honor knows my style. It's not
10 to waste a lot of time going over things that are not
11 really pertinent to the issues. But I think total
12 depositions could be 10 or 12 individuals, probably
13 comprised of seven or eight days.

14 Mr. Thomasch indicated he was going to
15 identify an additional expert other than Dr. Shamos.
16 I'm going to have an objection to that because that
17 individual has never been identified before. I think
18 it's not appropriate at this time. So I just bring
19 that to the Court's attention.

20 I obviously object to additional pretrial
21 briefing. We already did that. That's why we're
22 having a contempt hearing.

23 I'd like to focus these things. I think that
24 Mr. Thomasch and I could have more discussions in the
25 next couple of days. The Court is contemplating, I

1 gather, a hearing next Thursday. I am available. In
2 fact, I'm down in front of Judge Hudson on an initial
3 pretrial conference that morning. So I can make
4 myself available. And hopefully at that time the
5 parties can focus their areas of agreement and their
6 areas of disagreement if that's what the Court
7 anticipates.

8 THE COURT: Well, I have intended on the
9 afternoon of the 3rd of November to deal with the
10 following things. And that is first, between now and
11 then, if you want a continuance, you file a motion
12 asking for a continuance.

13 And you-all file the next day a response.
14 And you file the next day a reply. And I'll decide.
15 It will be clear at that point.

16 MR. ROBERTSON: Let me ask this because
17 Mr. Thomasch and I discussed this last night.

18 THE COURT: Unless you-all are in agreement
19 that you want a continuance.

20 MR. ROBERTSON: I thought we had agreement,
21 Dan, but please tell me if we didn't.

22 MR. THOMASCH: Your Honor --

23 MR. KREVITT: I was simply going to say, Your
24 Honor -- I'm trying not to interrupt. Mr. Robertson
25 said a whole lot of things to which we disagree just

1 now. With respect to the continuance, we will speak
2 with Mr. Robertson and his team. We understand that
3 if there is not an agreement with respect to a
4 continuance, you've ordered the party that wants one
5 to file a motion, and you have also set forth the time
6 for papers to be filed, and we will proceed
7 accordingly.

8 THE COURT: Mr. Krevitt, he said that
9 Mr. Thomasch had agreed to a continuance. If he has,
10 he did, it's done.

11 MR. KREVITT: I understand, Your Honor.

12 THE COURT: Mr. Thomasch, yes or no, did you
13 agree that a continuance was appropriate?

14 MR. THOMASCH: I indicated to Mr. Robertson
15 our position, which was we felt that a continuance was
16 appropriate, but we disagreed with the date he was
17 selecting.

18 THE COURT: Mr. Thomasch, the answer to that
19 question was yes.

20 MR. THOMASCH: Yes, Your Honor, we did agree
21 to --

22 THE COURT: The answer was yes. Now, you're
23 going to learn that you're going to have to deal with
24 things that way so I can understand you and we don't
25 have to waste a lot of time. But that's particularly

1 important given the difficulty the communication with
2 you is occurring. And it's not your fault because you
3 are responding to my request in short order that you
4 be available. But, please, do what I ask you to do.

5 All right. Then there is agreement that a
6 continuance is appropriate. And so I'm going to grant
7 the request for a continuance.

8 Now, the next thing is are you in agreement,
9 Mr. Robertson, insofar as you're concerned, have you
10 reached agreement with Mr. Thomasch on the date of a
11 hearing; yes or no?

12 MR. ROBERTSON: No.

13 THE COURT: All right. What date do you
14 propose?

15 MR. ROBERTSON: December the 12th, subject to
16 the Court's convenience.

17 THE COURT: Mr. Thomasch, what date do you
18 propose?

19 MR. THOMASCH: Your Honor, I don't have my
20 calendar. Mid January.

21 THE COURT: Mid January?

22 MR. THOMASCH: Yes, Your Honor.

23 THE COURT: All right. What's wrong with
24 that, Mr. Robertson?

25 MR. ROBERTSON: Obviously, Your Honor, we'd

1 like to move this forward as expeditiously as
2 possible.

3 THE COURT: I understand that, but you also
4 apparently have asked for a lot of documents. You've
5 got a lot of documents. I don't want anymore
6 briefing. I want you to conduct whatever discovery is
7 going to be allowed. We are going to have a hearing.

8 Whether or not there's a new expert that can
9 be allowed at this stage of the proceedings, I don't
10 know. I'll let you raise that in due course, and I'll
11 deal with it, but I don't need another round of
12 pretrial briefing.

13 We are not going to retry the case of
14 infringement. We're going to try the very limited
15 issues that I think I've already outlined you're going
16 to be trying.

17 Now, that's the way it's going to be and
18 we'll go from there to set a schedule. In view of
19 that, given that, do you oppose a hearing in January?

20 MR. ROBERTSON: Yes, Your Honor. My client
21 has instructed me to strongly oppose such a delay in
22 the case given what we think is the ongoing contempt
23 of a federal judge's order.

24 Also I'm very concerned as to the
25 disagreement we had in our discussions yesterday as to

1 the scope of what the hearing will be. I've heard,
2 Your Honor, that we're not going to retry the case,
3 but it's been suggested to me that this is going to be
4 a multi-day hearing. And I've tried to pin down how
5 many days Lawson believes it needs for this hearing.

6 I've not seen in the precedent anything more
7 than a two-day hearing. I think two days might be
8 appropriate. I think if we were efficient, we could
9 do it in one day given the Court's schedule, but I do
10 not want this turning into some sort of six-day
11 retrial of the case. And I would just urge that if
12 the Court is inclined to push it into January, we get
13 some parameters on the scope of what the hearing can
14 be and what evidence we can rely on.

15 Obviously, I want to provide the Court
16 deposition testimony, for example, that may not be
17 presented at the hearing. In addition, since I'm
18 dealing with millions of pages of documents, obviously
19 in a two-day hearing I won't be able to produce or
20 introduce as exhibits all those documents. I would
21 like that to be supplemented. I think I can --

22 THE COURT: Wait a minute. You'd like what
23 to be supplemented?

24 MR. ROBERTSON: I'd like to be able to
25 introduce additional documents other than what was

1 produced through witnesses at trial, such as documents
2 that were identified and discussed during the
3 deposition testimony that could be excerpted and
4 provided to the Court. That's what I was anticipating
5 and I think what Mr. Merritt suggested in his letter
6 to Your Honor.

7 THE COURT: Well, it seems to me this. I
8 think I have some understanding of your situation. I
9 want you to spend some time planning what is actually
10 to be done here. And it looks to me like the best
11 thing for us to do is get together on maybe the
12 morning of the 8th of November and give you all some
13 time to be sorting out how this is going to proceed
14 now that you know it's going to be continued.

15 And it will either be tried in the middle of
16 December or it will be tried in the early part of
17 January. I was trying to get my book and see what
18 early January was like.

19 MR. KREVITT: Your Honor, this is Josh
20 Krevitt. While you are getting your book, if we can
21 confer on specific dates, mindful that Your Honor
22 hasn't said whether it's going to be December or
23 January, and at least provide some suggestions for
24 either of those.

25 I mention that, Your Honor, because I have a

1 trial in east Texas currently set for -- we're picking
2 a jury on January 3 and openings, I believe, are
3 January 9.

4 THE COURT: Then it may be that your client
5 is going to have to have another lawyer handle this
6 case here instead of you because I was looking at
7 January 3 as one of the days to start this hearing and
8 January 9 as another day. No, not 9. I'm sorry.

9 MR. KREVITT: That's why I raised it, Your
10 Honor. Your Honor, if it's possible -- obviously
11 we'll do whatever Your Honor says, but if it's
12 possible, given this other longstanding trial, if it's
13 in January, to move it a week or two farther out into
14 January, we would very much appreciate that. But for
15 a trial, there would be no other reason I would ever
16 request it.

17 THE COURT: Who is it that's going to lead
18 the case?

19 MR. KREVITT: I think, Your Honor, it will
20 certainly be me or Mr. Thomasch, and probably a
21 combination.

22 MR. ROBERTSON: This is Mr. Robertson. I'm
23 available January 3. I'd agree to that date now if
24 that would resolve it.

25 MR. KREVITT: I understand you would agree to

1 the date. I just said I can't make that, Your Honor
2 I'm going to be picking a jury in Texas.

3 THE COURT: That's a *sub rosa* motion for
4 disqualification is your view of it?

5 MR. KREVITT: Yes, exactly. I didn't know if
6 it would be as obvious to the Court as it was to me,
7 Your Honor.

8 I would request, Your Honor, if possible --
9 two weeks, I wouldn't think, subject of course to Your
10 Honor's calendar, I'm not presuming anything about
11 that, but in terms of this case two weeks won't make a
12 very big difference, and it would allow me to be at
13 the trials I've been hired to handle.

14 THE COURT: Well, what's wrong with
15 December 12?

16 MR. KREVITT: Well, Your Honor, again, we
17 didn't anticipate having this kind of a substantive
18 discussion here. So I don't want to speak too much
19 off the hip, but we have an open question as to
20 whether ePlus will provide any discovery to us at all.
21 So far they have refused to do so.

22 When we get that discovery, assuming we get
23 the discovery, we think we're clearly entitled to it
24 and can't imagine a proceeding in which one party has
25 to produce discovery and the other doesn't, we're not

1 going to get that discovery for some time. And we
2 need to take far, far fewer number of depositions. We
3 may only have a 30(b)(6). I'm not certain, but far
4 fewer.

5 We have very limited discovery. Three
6 interrogatories, Your Honor. Ten requests for
7 production of documents. Very limited, narrowly
8 tailored discovery. But so far ePlus has refused even
9 to produce that discovery, let alone given us, of
10 course, a date by which it will happen.

11 This is a -- and I don't need to tell the
12 Court this, but the allegations here are extremely
13 serious, and we think it's essential and fundamentally
14 fair that the parties, Lawson in particular from my
15 perspective, have an opportunity to clearly have laid
16 out in an interrogatory what are the allegations of
17 contempt, as a sanction, that --

18 THE COURT: Well, they've already answered
19 that, Mr. Krevitt. They have alleged it, particularly
20 in their briefing, already.

21 MR. KREVITT: Your Honor, what they did in
22 their briefing is they addressed it, that's true, and
23 we addressed it in our briefing. They served
24 discovery on us, of course, including an
25 interrogatory. We answered the interrogatory about

1 the changes. And they didn't think that was good
2 enough. And the magistrate judge, in your absence,
3 ordered us to produce a much, much, much more detailed
4 interrogatory, which we did, and submitted to Your
5 Honor for Your Honor's reference some 20 or so pages,
6 maybe more, detailing the differences in narrative
7 form, the differences in our system, our old system
8 versus our new system.

9 It can't be, Your Honor, I will respectfully
10 submit, that a party can bring a motion for a
11 contempt -- and by the way, it wasn't a motion. It
12 was briefing in connection with the contempt
13 proceeding. This may be a small point, but it was
14 briefing on an order to show cause as to whether there
15 should be a contempt proceeding.

16 THE COURT: Right.

17 MR. KREVITT: They filed their brief, that's
18 true, but we cannot possibly see why ePlus should not
19 be required, and in any event, would it want to, set
20 out in response to an interrogatory clearly in one
21 place what are their allegations.

22 It's not enough, as Your Honor knows, to say
23 this is a difference between the new product and the
24 old product. The question is how meaningful that
25 difference is. Is that difference colorable, only

1 colorable, more than colorable? Obviously, Your Honor
2 is aware of that standard. And we are entitled, Your
3 Honor, having served discovery, to get responses to
4 that discovery in which we asked them clearly to set
5 out what their allegations are, what the evidence they
6 have for those allegations are, what are the documents
7 on which they are relying on these very serious
8 allegations.

9 THE COURT: We had a conference over a month
10 ago, a telephone conference, and Lawson didn't ask for
11 any discovery at all.

12 MR. KREVITT: Your Honor --

13 THE COURT: What we've got is we've got new
14 lawyers in the case who decided they want to change
15 the approach. They didn't ask for any discovery that
16 I remember.

17 MR. KREVITT: I don't want to interrupt, Your
18 Honor. I'm sorry. I didn't know if Your Honor was
19 done.

20 THE COURT: No.

21 MR. KREVITT: I don't think that's quite
22 right in this respect. You're obviously right that at
23 that time a request wasn't made. We've spoken with
24 the Merchant & Gould lawyers. We've read the
25 transcript. There certainly was no suggestion that

1 Lawson wouldn't take discovery, Your Honor. And
2 Lawson has every right to serve discovery and has done
3 that.

4 THE COURT: I understand that, but the point
5 is when you delay what you're doing, you have to pay
6 the price for delaying.

7 MR. KREVITT: But we didn't delay, Your
8 Honor.

9 THE COURT: Well, you did because you should
10 have raised that in September when we were having the
11 scheduling conference on this. That's their point,
12 and that's a fairly reasonable point actually. So I
13 understand what's happened.

14 We have got new lawyers in the case. Just
15 understand, we're not going to retry the case.

16 MR. KREVITT: Your Honor, the notion of
17 retrying the case, I have to respond having heard that
18 from Mr. Robertson six times. I want to be very, very
19 clear, Your Honor. We do not want to retry this case.
20 We understand the issues that Your Honor will have to
21 address.

22 I think if Your Honor reads Mr. Merritt's
23 letter from ePlus, it will be very, very clear to Your
24 Honor the extent to which ePlus is trying to
25 articulate a standard for this proceeding that is

1 simply wrong.

2 They say that the issue is whether or not the
3 changes render the RQC product noninfringing. And
4 then they quote Your Honor from that conference.

5 Your Honor's quote is correct. It gets the
6 law exactly right, but the ePlus letter that sets
7 forth what the issue for Your Honor to decide is
8 wrong. It is not whether or not the new products
9 infringe. We reach that only if there is first a
10 judgment by Your Honor that the changes are not more
11 than colorable.

12 If they are only colorable, then we reach the
13 question as to whether there is infringement or not.
14 And the problem, Your Honor, is we do not want to
15 retry this case. We want to focus very narrowly on
16 that question.

17 The reason a million pages of documents were
18 produced in this case, Your Honor --

19 THE COURT: Excuse me. You want to focus
20 very narrowly on what question?

21 MR. KREVITT: We want to focus very narrowly,
22 Your Honor, in the first instance on the question that
23 *TiVo v. EchoStar* says we have to, which is whether
24 ePlus can prove that the new products are not more
25 than colorably different.

1 The first question, Your Honor, focuses
2 simply on that delta between at the old products and
3 the new products, not whether the new products
4 infringe. They don't, but that's not the question for
5 Your Honor in the first instance. It's simply when
6 you compare the new product to the old product and you
7 look at the delta, the differences between those
8 products. Are those differences colorable, more than
9 colorable, less than colorable? What is the
10 difference between those? And the way you judge that,
11 Your Honor, is using two tools.

12 THE COURT: Wait a minute. Where do you go
13 after that, according to you?

14 MR. KREVITT: Where do we go after that?
15 Well, in our view, Your Honor, we won't go anywhere.

16 THE COURT: Let's assume that we've concluded
17 that there are colorable differences.

18 MR. KREVITT: Obviously, Your Honor,
19 understands. I wasn't trying to be cute. My point
20 was I think we'll win on that first issue.

21 If we do not, if Lawson does not win and
22 ePlus is able to prove that the new product is not
23 more than colorably different, the delta isn't
24 significant enough, then we go to the question
25 regarding whether the new products infringe.

1 MR. ROBERTSON: Your Honor, this is
2 Mr. Robertson. This is where we fundamentally
3 disagree. Lawson's articulated three reasons why RQC
4 is supposed to be colorably different from RSS and the
5 other systems that were found to infringe. And let's
6 not lose sight that there were configurations Your
7 Honor is aware about that just don't involve RSS.

8 Having said that, if they only articulate
9 three reasons and we show that all three of those
10 reasons are wrong, then is Mr. -- is it Krevitt? I'm
11 sorry. I know it's Josh. Is he suggesting we now
12 have a new infringement trial?

13 If they haven't articulated any other
14 differences, I think Your Honor logically can assume
15 it follows inexorably that they continue to infringe
16 because that's the only three differences they
17 identified.

18 So if it's the suggestion we have some
19 two-phase approach here where we have to have a
20 retrial on infringement again, that's just not
21 consistent with the case law. But we can brief that
22 after we put our evidence on at what I would hope
23 would be a focused contempt proceeding. And if that's
24 their position, let that be their position. But I
25 don't understand how they can come forward and say,

1 "We only changed three things," and if you show those
2 things aren't colorably different, now we need a new
3 infringement trial. That makes no sense to me and
4 it's not what *TiVo* teaches.

5 MR. KREVITT: Your Honor, this is Josh
6 Krevitt.

7 Given Your Honor's guidance on this call
8 about revving engines and not revving engines, I've
9 been doing my best not to interrupt, and I would
10 appreciate the same courtesy from Mr. Robertson.

11 THE COURT: I think he thought you were
12 through.

13 MR. KREVITT: Okay. The *TiVo* case, Your
14 Honor, could not be any clearer. And, obviously, one
15 thing on which the ePlus lawyers and the Lawson
16 lawyers agree is that *TiVo v. EchoStar* is a big deal.
17 And so Your Honor will make your own judgment on that.

18 In our view, and we could be wrong, Your
19 Honor could read the case differently, in our view we
20 think it's very clear that the Court in that case set
21 out a two-part analysis.

22 And the first part is the colorable
23 difference analysis. And the second part is if the
24 plaintiff prevails on that first part whether there's
25 infringement or not, Mr. Robertson -- I'm hoping, Your

1 Honor, we never reach this question because we win on
2 the first one, of course, but Mr. Robertson, I think,
3 clearly, and I think this is an objective statement of
4 what he just said, and we disagree, conflated those
5 two and said that if they prevail on the colorable
6 question, I'm speaking in shorthand, of course, but if
7 they prevail on that question, then it's reasonable
8 for the Court to assume, for the Court to rule, that
9 the new products infringe, and, therefore, find Lawson
10 in contempt.

11 I respectfully submit, and it may well be
12 that we've exhausted the utility of telling the Court
13 what the case says, and the Court has and will read it
14 for the Court, but we respectfully submit that that's
15 wrong, that the Court set out this two-prong inquiry.

16 THE COURT: Excuse me just a minute.

17 How many cases have been decided following
18 *TiVo* that deal with *TiVo* and apply it?

19 MR. KREVITT: That's a good question, Your
20 Honor. I think it's not many. Half a dozen. We'll
21 have our crack crew come up with an answer to that
22 question, Your Honor. It's not many.

23 By the way, this issue was not in passing in
24 *TiVo*, meaning the question --

25 THE COURT: We don't need to argue that now.

1 MR. KREVITT: Okay. I just wanted to mention
2 that that's a big deal in the case is what is the
3 right inquiry. Should we be having an infringement
4 case or should we not be having an infringement case.

5 And the reason, Your Honor, if I may just say
6 one more word, and I know Your Honor doesn't want to
7 have a debate, but one thing to put this into context.

8 The reason the *TiVo* court held what I'm
9 saying the court held is as follows: A contempt
10 proceeding, and we're seeing this right on this phone
11 call, is different than in normal litigation. We have
12 all the discovery available to both parties, and you
13 have a jury, and you have all the procedural
14 protections available, and the plaintiff has the
15 burden of infringement, of course, and we have the
16 ability to defend on validity. All those things exist
17 in a normal litigation. And all those things or many
18 of those things don't exist in a contempt proceeding.

19 And what the *TiVo* court ruled was if the
20 products are sufficiently different, the new products
21 from the old products, and ePlus thinks they infringe,
22 let them bring an infringement case. Again, I'm not
23 being cavalier about that, Your Honor. We think they
24 don't. But if they think the products infringe, but
25 they're very different from the old products, then

1 that's not an issue for a contempt proceeding. That's
2 an issue for a new lawsuit.

3 Only if the products are so close that they
4 can satisfy this -- that they are not colorably
5 different, that they are essentially the same.

6 THE COURT: Isn't that what Mr. Robertson is
7 saying is that if they're not colorably different,
8 then you violate the Court order and the determination
9 that there has been an infringement of the patent?

10 MR. KREVITT: Yes.

11 THE COURT: I don't think you're really
12 saying anything different.

13 MR. KREVITT: Well, we are, Your Honor, in
14 this respect. I'll let Mr. Robertson speak for
15 himself, of course, but I think you have his position
16 exactly right, but here's the point that I'm making.
17 And in many cases this may not be a huge issue in
18 certain circumstances.

19 It is not true that if the products are not
20 colorably different, that is to say they are very
21 similar, that you skip to a contempt finding. You
22 then have to do an inquiry on infringement because,
23 Your Honor, you could have products that are not
24 colorably different but are a little different. Very,
25 very little difference. Let's say that Your Honor

1 finds that they are not colorably different, but that
2 little, little difference is sufficient to take them
3 out from infringement.

4 THE COURT: I don't think *TiVo* held that.
5 *TiVo* didn't address that issue. The argument may be
6 that it flows from *TiVo*. I understand that. But I
7 don't think -- it's been awhile. I read it and I may
8 have it wrong. I think you described *TiVo* correctly
9 when you first articulated what you thought it meant,
10 not the most recent. And I don't mean when you first
11 articulated it. I mean in the last time you tried to
12 summarize it.

13 MR. KREVITT: I know. I know. Which is not
14 a good sign. I certainly wasn't trying to change my
15 position, Your Honor.

16 THE COURT: Let's stop now. Let's hold our
17 powder.

18 MR. ROBERTSON: Your Honor, this is
19 Mr. Robertson.

20 THE COURT: You want a shot at him anyway
21 even though he's putting his musket back up?

22 Wait a minute, Mr. Krevitt. Have you served
23 time in the Senate?

24 MR. KREVITT: The U.S. Senate, Your Honor?

25 THE COURT: Yes.

1 MR. KREVITT: No.

2 THE COURT: Because I believe you may be
3 getting a good filibuster style. So slow down. Give
4 him an opportunity to say --

5 What do you want, Mr. Robertson?

6 MR. ROBERTSON: Just briefly, Your Honor.
7 Sometimes a page of experience is worth a volume of
8 logic. We did look at the post *TiVo* cases. I haven't
9 seen any post *TiVo* case that went past a two-day
10 contempt proceeding.

11 Even the *TiVo* case had a three-day contempt
12 proceeding, not a new infringement trial. And the
13 Federal Circuit upheld in large part contempt by
14 *EchoStar* of the Court's injunction.

15 THE COURT: Do we really need to get into
16 that now?

17 MR. ROBERTSON: No, sir.

18 THE COURT: Give me a minute now, if you
19 will.

20 What I'd like, I think, to see you all do, I
21 was hoping to get it accomplished by the 3rd of
22 November, but maybe it's unrealistic given where you
23 are. With a view to trying the case in December or
24 early January, you need to do the following, I think:

25 I'd like to see you talk about these issues

1 of discovery and identify as well where you think this
2 hearing ought to go and what it ought to look like,
3 how long it will take, and brief me on it. And then
4 we'll sit down and talk about it all.

5 In the meantime, I realize that you have some
6 things going on like the documents, etc., that could
7 be impacted by whatever ruling I make on the scope of
8 the matter, but I don't want the discovery at the same
9 time to be held up.

10 I don't see why, Mr. Robertson, that a
11 defendant in a contempt proceeding, if you have
12 discovery, that a defendant is not entitled to some
13 discovery, too. And I want you-all to talk about
14 that. I think it ought to be limited.

15 And it is correct that when Lawson had its
16 shot, it didn't really ask for it. But, in essence,
17 what you're asking me to do is to hold that they
18 waived their right to ask for any discovery in that
19 conference. And I would respectfully think you might
20 want to think would you like to defend that position
21 in the Federal Circuit were I to --

22 MR. ROBERTSON: Your Honor, I'm willing to
23 address that right now, sir, and tell you that if they
24 had picked up the phone and asked me about some
25 reasonable discovery and some reasonable time limits

1 and some reasonable scope, I probably would have
2 agreed. But they served us with discovery, and then
3 without leave of court gave us an expedited schedule,
4 which I thought was improper since we had asked for
5 leave of court.

6 THE COURT: I know, but --

7 MR. ROBERTSON: I'm going to agree to
8 discovery, Your Honor, but I want it to be focused and
9 limited in its scope.

10 THE COURT: And I think that's what I want
11 you-all to talk about in the next several days. And I
12 believe you can work that out.

13 In the meantime, I also would like for
14 someone -- given that you all have such radically
15 different views about what the nature of a contempt
16 proceeding is following *TiVo*, I want you to brief what
17 you think -- just that issue. Not in terms of this
18 case right now, but in terms of just with respect to
19 what you think *TiVo* requires using that decision, the
20 decisions on which *TiVo* drew and the decisions ensuing
21 *TiVo*.

22 I just don't believe that *TiVo* requires a
23 complete new hearing on the issue of infringement, but
24 I may be wrong. So I'll be glad to hear about it.

25 And since you seem to be the one raising the

1 issue, Mr. Krevitt, perhaps you-all can start the
2 briefing. Would you think that would be good or do
3 you want them to start the briefing?

4 MR. KREVITT: I'm happy to, Your Honor. And
5 just to be clear because I know, Your Honor, when you
6 ask a question or ask for something, want it limited
7 to the particular question you're asking. You don't
8 want us in this letter to address how that standard
9 would impact this case.

10 THE COURT: I do not. And I don't want it in
11 a letter. I want it in a statement of position filed
12 in the court like a pleading.

13 MR. KREVITT: Yes, Your Honor. We'll do
14 that.

15 I assume also you don't want -- so nothing
16 about this case meaning also how procedurally we ought
17 to take account of that in this case? Just instead a
18 mention of what we think *TiVo* means and how the cases
19 since it apply it, and more of a statement of the law.

20 THE COURT: That's right.

21 Now, Mr. Robertson, do you object to him
22 going first or do you think you want to go first?

23 MR. ROBERTSON: I think, sir, since I have
24 the burden of proof here that the plaintiff should go
25 first. But I would like to -- I am very mindful of

1 the expense involved here, and I don't want this to go
2 spiraling off.

3 I would ask that we go first. We are limited
4 to 10 pages. They go second. They are limited to 10
5 pages. And we go last and we're limited to 10 pages.

6 MR. KREVITT: That seems like an awful lot of
7 briefing to talk about what the standard in *TiVo* is.
8 We're happy, as Your Honor originally suggested, to go
9 first, Your Honor. I had envisioned it being shorter
10 than that, but it --

11 THE COURT: Mr. Robertson, remember you have
12 a court reporter here, and she's going to demand that
13 I buy her at least three or four martinis at the end
14 of the day today given what you're subjecting her to.
15 Come one.

16 All right. I think the best thing to do
17 here, given that the plaintiff started this process,
18 is that the plaintiff shall go first, and you are
19 willing to agree to a lesser number of pages, I
20 believe, is about what you were willing to say, Mr.
21 Robertson. How many pages do you want?

22 MR. ROBERTSON: Seven, seven, five, but I'm
23 willing to hear from Mr. Krevitt on it.

24 THE COURT: All right.

25 MR. KREVITT: Your Honor, I'm happy really --

1 I'm not always disagreeable. I'm happy to do whatever
2 Your Honor thinks. To me the notion of a reply brief
3 when we're talking about what the law means seems a
4 bit silly, but I would envision that ePlus sets out,
5 we're going to be tethered to the case is --

6 THE COURT: Yes, you are. And I think seven
7 pages is too short. So you take ten pages. You take
8 ten pages. You can have a five-page reply.

9 All right. Now, that just is on what you-all
10 think that *TiVo* requires that a contempt proceeding
11 do.

12 MR. KREVITT: Right.

13 THE COURT: Generally, what is it that it
14 must do, and why, and with authority.

15 Now, the next thing I think you need to do is
16 to sit down and tell me, each of you, what you think
17 in a separate paper this hearing ought to look like,
18 and in particular, how many witnesses do you think you
19 want, how long do you think it would take, and sort
20 out that issue so I can make an intelligent decision
21 about how much time to allot.

22 I don't plan to allot a lot of time to the
23 matter, but I at least want to hear what you have to
24 say.

25 What?

1 MR. KREVITT: I'm sorry to interrupt, Your
2 Honor. I just wanted to ask a point of clarification,
3 but obviously I'll wait until you're finished.

4 THE COURT: So I want a separate statement of
5 position on the nature of the contempt proceeding in
6 this case, what you think has to be shown, and
7 exactly, just in outline form, how you're going to do
8 it, how many witnesses, and how long you think it will
9 take, and that kind of thing. How much in the way of
10 documentation do you think, based on what you know now
11 or as of the time you file these things, you're
12 looking at. And then we can shape this matter.

13 And I'd like to have that available before I
14 meet with you on the 8th of November.

15 MR. ROBERTSON: Your Honor, this is
16 Mr. Robertson again. Just to refresh you that we're
17 not even going to finish the document production until
18 sometime next week. And that's even before -- I
19 mentioned to Your Honor early on it's probably going
20 to take maybe, with these outside counsel I brought in
21 as contract attorneys, trying to save costs, two weeks
22 to review the documents.

23 I think I'll have an idea, but I really won't
24 have a handle even on the production by that point.
25 We won't have started a single deposition. I have an

1 idea and I can inform the Court. I just wanted to
2 give you that caveat.

3 THE COURT: I understand.

4 Now, Mr. Krevitt, when are you going to
5 finish the production of the documents that you're
6 planning to produce?

7 MR. KREVITT: Your Honor, my understanding is
8 that we will be complete with that production by the
9 end of next week.

10 THE COURT: Friday of next week? That's
11 November the 4th.

12 MR. KREVITT: That is my understanding, Your
13 Honor. If there is any -- if that is wrong at all, we
14 will inform ePlus and the Court promptly, but my
15 understanding, and again, I'm sorry for not being
16 prepared to answer that question definitively, Your
17 Honor. I didn't know that question would be asked,
18 but that's my understanding, and we'll confirm that
19 right away.

20 THE COURT: I don't see why on earth it
21 should take any longer than that given that you've
22 produced a million pages.

23 MR. KREVITT: Yeah, I think we will be done
24 with it.

25 THE COURT: All right. I'd like to see a

1 copy of the privilege log. Somebody send that to me
2 after you file it.

3 MR. KREVITT: Yes, Your Honor, we'll do that.

4 THE COURT: All right. So, Mr. Robertson,
5 what do you say? He says by Friday.

6 MR. ROBERTSON: Yes, Your Honor. It's been a
7 month since we originally had our September 15 call,
8 but if that's what it is, I accept his representation,
9 but it just puts me in a difficult position to make
10 the representation Your Honor wants me to do with
11 regard to the hearing. And so I would just hope I
12 would be afforded some leeway to properly inform the
13 Court, you know, if the scope of things change because
14 until I review the documents, I'm not certain who I'm
15 deposing, that kind of thing.

16 THE COURT: All right. I understand.

17 How many documents, Mr. Krevitt, do you think
18 you have yet to produce? What is the volume that
19 we're talking about?

20 MR. KREVITT: Your Honor, I think, and I'm a
21 little reluctant to be real precise for obvious
22 reasons, but it is compared to the overall production
23 a very small number. I think we're talking, I'll
24 confirm right away, but I think we're talking in the
25 neighborhood of 20- to 30,000 pages of documents.

1 THE COURT: Why it takes you another week to
2 produce that much I don't know, so I think you better
3 (A) by Monday know how much you're going to produce,
4 and (B) by Monday give me the earliest date that you
5 can produce it. And I think that needs to be done by
6 the end of the day Monday so we all know what we're
7 talking about.

8 And I urge you to produce them sooner rather
9 than later.

10 MR. KREVITT: I don't need any more time to
11 assure Your Honor we will do that. And what's more,
12 when I said the end of next week, I meant for the last
13 document to be produced. We have been and will
14 produce them on a rolling basis.

15 We have as many lawyers as Mr. Roberson
16 identified, I can promise you we've got that many and
17 more, probably 2X that have been struggling to get
18 this done. So we will produce them right away, but we
19 obviously will do what Your Honor just asked by
20 Monday.

21 Your Honor, may I ask one point of
22 clarification and make a quick observation?

23 THE COURT: Yes.

24 MR. KREVITT: The observation first. I'm
25 confident Your Honor doesn't want to get into the

1 document issues too much, but I did want to just make
2 one point that I tried to make earlier today, which
3 I'll keep brief.

4 The reason there were so many documents
5 produced is we produced according to search terms
6 provided by ePlus. And I just wanted to identify for
7 the Court a few of those terms.

8 ePlus asked us to produce all documents that
9 have the word "valid" in them. All documents that
10 have the word "jury." All documents that have the
11 word "injunct, injunction, enjoin," anything.

12 So these are ePlus' search terms. This
13 wasn't Lawson trying to come up with a wide net. As I
14 said at the outset, Your Honor, we are acutely
15 sensitive to how we proceed during these contempt
16 proceedings and to make sure that there can be no
17 credible suggestion that we're withholding any
18 information or not doing what we ought to be doing.

19 But I wanted to address that because that's
20 why so many documents were produced. When you asked
21 us to produce any document that has the word "valid,"
22 and not just those letters, so it's invalid,
23 invalidity, anything, you're going to get an awful lot
24 of documents. That's what we did. Those are ePlus'
25 search terms.

1 THE COURT: But you're saying from the date
2 the jury returned its verdict, there were a million
3 pages of documents that contained that kind of
4 information. And even with those search terms, that's
5 a startling amount to me. But anyway, you-all are
6 dealing with it. You deal with it.

7 MR. KREVITT: Yes.

8 THE COURT: With respect to the discovery
9 request by Lawson, you-all talk about those and see
10 what you can resolve with a view to keeping them
11 narrow as you said you thought they were. Apparently
12 they don't think they are.

13 MR. KREVITT: Well, I don't know yet whether
14 they do or they don't, Your Honor. I think they have
15 just been objecting on the grounds that Your Honor
16 identified as to whether they were too late, but we'll
17 confer promptly and hopefully resolve those issues
18 without needing to burden the Court with them.

19 THE COURT: All right. Is there any reason
20 we can't meet on the 8th of November?

21 MR. KREVITT: Your Honor, may I just ask you
22 a point of clarification real quick because I know
23 I'll forget it?

24 On the document that the Court has requested,
25 not the legal document on *TiVo*, the other document in

1 which we set out what we're thinking for the hearing
2 procedurally, how many witnesses, how long, how it
3 should proceed, were you envisioning a joint
4 submission in which we identified the areas of
5 agreement and identify the areas of disagreement or
6 would you like the parties to submit two separate
7 documents? It's a relatively small point, but I want
8 to make sure that both parties are doing what's most
9 helpful to the Court.

10 THE COURT: Well, if you all have areas of
11 agreement, it certainly is helpful to set them out in
12 a joint way. I just don't want you to get into a
13 situation that it becomes unmanageable.

14 So I'd prefer it if you have a section that
15 says what you agree on, a section that identifies a
16 topic, and whether you agree on it or not, what you
17 agree to, and then what you disagree on, and what each
18 of your respective positions are on a topic by topic
19 basis.

20 MR. ROBERTSON: This is Mr. Robertson. We're
21 happy to do that.

22 THE COURT: All right. Let's try it that
23 way. Then you-all file that. File the legal paper,
24 Mr. Robertson. When are you going to file that? The
25 statement of position on *TiVo*.

1 MR. ROBERTSON: Yes, I understand. I've got
2 a lot of moving parts here, Your Honor, including I
3 have the appeal brief going as well in the Federal
4 Circuit, and Lawson has another law firm handling
5 that, and that's due December 5, which complicates my
6 life.

7 I would suggestion seven days. Next Friday,
8 Your Honor. I just received the revised privilege
9 log, which is still 2000 pages long and contains more
10 than 17,600 entries.

11 THE COURT: Well, you're going to send me a
12 copy of that privilege log, aren't you?

13 MR. KREVITT: This is Josh Krevitt, Your
14 Honor. It's ours. I'm happy to send that to you.

15 THE COURT: I'd like it in a notebook.

16 MR. KREVITT: Very well, Your Honor.

17 THE COURT: Or two notebooks or something. I
18 tell you what I'm going to do. I'm going to take a
19 look at it, and I'm going to single out some
20 documents, and I'm going to ask you to give me those
21 documents. And if I find that they're not privileged,
22 I'm going to establish a procure that's going to
23 eliminate the need for anybody to look through 2000
24 pages of paper.

25 I mean it, Mr. Krevitt. In 40 years of

1 practicing law, I've never heard of such a thing. I
2 think somebody has gone hog wild and crazy, to quote
3 the old boy.

4 MR. KREVITT: Yes. Your Honor, we will get
5 that to you. All I can say on that point is that this
6 has been a difficult process. Not because of Your
7 Honor at all, but we have been, as I said, with
8 literally dozens of people, dozens of people, trying
9 to search for documents, trying to come up with a
10 procure that would allow us to guard against a
11 production of privileged material.

12 It is admittedly an imperfect process and
13 very well may have resulted in a privilege log that
14 should be smaller than the one that we're going to
15 supply to Your Honor.

16 THE COURT: And, Mr. Krevitt, I'm going to
17 tell you what procedure I've taken in the past. If I
18 find some abuse like this, some problem like this, I
19 have often required the -- or I have in the past
20 required, not often, the senior member of law firms
21 like the executive committee to sit down and look at
22 these documents and make these cuts and tell me
23 whether they fly or not. And I've found that that has
24 an amazing effect in bringing reality to what is a
25 privilege claim or not.

1 I hope I don't have to do that, but I am very
2 troubled by the notion that there is 2000 pages in a
3 privilege log.

4 MR. KREVITT: I understand, Your Honor.

5 THE COURT: And please, Mr. Carr, will you
6 get those delivered next week sometime early?

7 MR. CARR: Yes, Your Honor.

8 THE COURT: In notebooks that are manageable.
9 Those great big notebooks are not helpful. And
10 labeled on the spine so I can read what they are, what
11 volume, etc.

12 MR. CARR: I understand.

13 MR. KREVITT: Your Honor, this is Josh
14 Krevitt.

15 Obviously, we'll get you those notebooks and
16 we'll do that next week as you requested. In light of
17 the guidance Your Honor has provided on this issue, I
18 hope it's obvious to the Court, we are going to go
19 back and devote substantial resources to taking a
20 very, very hard look at that. So it may be that the
21 privilege log Your Honor gets will be smaller. Maybe
22 much smaller. Or it may be that that process just
23 doesn't complete by the time we send that to you and
24 we'll have to inform Your Honor if we have removed
25 documents after that.

1 THE COURT: All right.

2 MR. KREVITT: I have heard you, Your Honor,
3 loud and clear, and we will get on that issue.

4 THE COURT: All right.

5 If I don't have anything before the 8th of
6 November about what you-all think the shape of life is
7 like, it's hard for me to make plans about how to deal
8 with the case and how to rule on some of the disputes.
9 So I was hoping to get these statements. You-all
10 certainly have been through all this for a long time.

11 I was hoping to get something from you early
12 next week, Mr. Robertson, and then have them reply
13 very shortly, and have in front of me by November the
14 7th both of these statements of positions that I'm
15 talking about.

16 Is that not doable?

17 MR. ROBERTSON: Yes, sir. How about
18 Wednesday?

19 THE COURT: All right. You provide yours
20 Wednesday. The statements of position and the two of
21 them that I said, the law and the general outline of
22 how you think this thing ought to proceed, on November
23 the 2nd. And then you provide yours, that's the legal
24 paper, on November the 2nd.

25 And you provide your response on November the

1 4th.

2 And you provide your reply by noon on
3 November the 7th on the legal paper.

4 On the joint paper, if I could have that from
5 you-all, that is about how it is you think we proceed.
6 And I recognize it's going to be framed in perspective
7 of how you see what the meaning of *TiVo* is. And if
8 you could get me that by, say, the afternoon of the
9 3rd of November, it would be helpful.

10 MR. ROBERTSON: Sorry, Your Honor. You broke
11 up.

12 THE COURT: The 3rd of November. Excuse me.
13 The 4th of November. That's a week from today. All
14 right?

15 MR. KREVITT: Your Honor, small request on
16 the schedule of position papers. Rather than having
17 only two days, I don't know what the 10-page document
18 will look like from ePlus, and they have under the
19 schedule you suggested almost a week to do it, five
20 days to do it, rather than just two days for us to
21 file a response, if we could have at least until
22 Monday, which would give us the weekend, I would
23 appreciate it. We would prefer Tuesday, but I'm sure
24 we could get it done by Monday.

25 THE COURT: Well, they're going to give it to

1 you on Wednesday by the end of the day. That's 5
2 o'clock on Wednesday.

3 MR. KREVITT: Yes, Your Honor.

4 THE COURT: So you file yours on Saturday by
5 noon. And they file the reply on Monday by noon.

6 Then I'll have all that in time to sit down
7 and try to do some studying over it. And then we'll
8 proceed from there to try to sort this out.

9 I think you-all can work many of your
10 problems out. And I hope you do. All right?

11 Is there anything else that you all need to
12 deal with at this time?

13 MR. CARR: Judge, this is Dabney Carr. A
14 real quick question. What time on November 8 do you
15 want to meet with us?

16 THE COURT: I'm sorry. I thought I said
17 10 o'clock, but if I didn't, I'd like to do that.

18 Where are you, Mr. Krevitt?

19 MR. KREVITT: I am in New York, Your Honor.

20 THE COURT: Well, you all can come down here
21 on a morning flight if you're thrill seekers and we
22 can meet a little bit later in the day. What time is
23 that morning flight?

24 MR. KREVITT: Ordinarily, Your Honor, I would
25 come down the night before so there are no issues. It

1 turns out I absolutely need to be in New York the
2 night before. So if it is possible to move it a bit
3 later on the 8th, I sure would appreciate it.

4 THE COURT: Why don't you look at the
5 flights. And Mr. Carr, you call back. I would like
6 to have it make sense.

7 Where is Mr. Thomasch?

8 MR. KREVITT: He's up in New York with me,
9 Your Honor.

10 THE COURT: All right.

11 MR. THOMASCH: We're checking on flights and
12 we'll be able to get back quickly.

13 THE COURT: We'll be flexible about it and
14 try to do it later in the morning.

15 If I remember correctly, there used to be a
16 fairly early flight down here, but I haven't done that
17 in awhile.

18 MR. KREVITT: I appreciate that, Your Honor.
19 We'll address that right away.

20 THE COURT: All right. Is there anything
21 else?

22 MR. ROBERTSON: Not from ePlus, Your Honor.

23 THE COURT: All right. Thank you all very
24 much.

25 MR. KREVITT: Thank you, Your Honor.

1 MR. ROBERTSON: Thank you, Your Honor.

2 THE COURT: Bye-bye.

3

4 (The proceedings were adjourned at 5:50 p.m.)

5

6 I, Diane J. Daffron, certify that the
7 foregoing is a true and accurate transcription of my
8 stenographic notes.

9

/s/

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DIANE J. DAFFRON, RPR, CCR DATE

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